

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Developing a)	
Unified Intercarrier Compensation)	
Regime)	
)	
Petition for Declaratory Ruling of)	CC Docket 01-92
T-Mobile USA, Inc., <u>et.al.</u>)	
)	
Petition of US LEC Corporation)	
for Declaratory Ruling Regarding LEC)	
Access Charges for CMRS Traffic)	

REPLY COMMENTS

TDS Telecommunications Corporation¹ (TDS Telecom or TDS), the Oregon Exchange Carrier Association,² Washington Exchange Carrier Association³ and Colorado Telecommunications Association⁴ (together the Rural Carriers) file these reply comments to support comments opposing the Petition For Declaratory Ruling (Petition) filed by T-Mobile USA, Inc., and other wireless carriers (WCs or Petitioners). The TDS Telecom local exchange carriers and other Rural Carriers' members (LECs), like many of the commenters in the first round, terminate traffic for indirectly connecting wireless carriers, but in many cases are not currently receiving compensation for the use of their networks for this traffic.⁵

¹ TDS Telecom owns 111 incumbent local exchange carriers (ILECs) in 28 states. All are "rural telephone companies" as defined in 47 CFR §153(37).

² The Oregon Exchange Carrier Association is a non-profit corporation whose members are the rural telephone companies operating in Oregon.

³ The Washington Exchange Carrier Association is a non-profit corporation whose members are the rural telephone companies operating in Washington.

⁴ The Colorado Telecommunications Association is a non-profit corporation whose members are rural telephone companies operating in Colorado.

⁵ It should be noted that in addition to rural carriers, CLECs face the same problems and have the same need for a compensation mechanism as rural LECs.

A. Background and Summary

Petitioners seek a declaratory ruling that LECs with whom WCs do not directly interconnect – typically rural LECs, characterized by the Petitioners as having low traffic volumes from WC customers – may not use state tariffs to charge for terminating wireless originated calls. Since WCs choose not to deliver traffic directly to the rural LECs' service areas, a WC whose customer originates a call bound for a customer in the rural LEC's service area delivers the call to a non-rural LEC tandem for switching and carriage through the non-rural LEC's service area. The call is then handed off to the rural LEC for delivery within its service area. As the Petitioners describe, WCs have utilized these Type 2A, tandem-level interconnection arrangements, typically with the Bell Operating Companies (BOCs), to provide LATA-wide termination of mobile-to land traffic.⁶ Petitioners pay the intervening carrier for its role in transiting the calls, but claim that WCs owe no compensation at present for using the terminating rural LEC's network.⁷

The non-rural LECs traditionally compensated the rural LECs for terminating these indirectly connected WC-originated calls. However, since the Commission's decisions implementing §§251 and 252, the non-rural LECs have been discontinuing the long-established settlement arrangements.⁸ These decisions by the non-rural LECs leave rural LECs without a compensation mechanism.

The WCs contend that they are entitled to this free termination of their traffic because:

⁶ Petition at 2-3.

⁷ Rural Carriers' primary focus in these reply comments is on the dealings between indirectly connecting rural LECs and WCs. The only relevance of transit arrangements as they relate to the present Petition is that more and more rural LECs are finding themselves on the receiving end of transited traffic without the historical compensation revenues that were previously flowed through by the large LECs.

⁸ See BellSouth at 2, SBC at 5. In these reply comments, TDS identifies the parties by the abbreviations or acronyms they use in their comments.

(a) rural LECs have filed tariffs without asking each WC to negotiate a reciprocal compensation agreement; (b) state termination tariffs contravene the Commission's policies and the rural LECs' duty to negotiate in good faith; and (c) "bill-and-keep" is the lawful "default" for this traffic absent such an agreement and simply preserves the "status quo".

The Rural Carriers join other commenters opposing the Petition in demonstrating that the WCs have not made the requests necessary to set in motion the procedures and obligations in §§251 and 252. Thus, their efforts to enforce them against LEC termination tariffs are premature and unjustified. Moreover, the bill-and-keep regime Petitioners claim as the "default" arrangement and the "status quo" is not required by law, rule or Commission policy. "Bill-and-keep" is not the "status quo" or even lawful for CMRS-ILEC arrangements that often involve unbalanced traffic flows primarily from the WCs to the rural LECs. As to Petitioners' claims that rural LECs have violated a duty of good faith negotiations, it is actually the WCs that have unilaterally substituted bill-and-keep arrangements for the negotiated agreements they are statutorily required to initiate by requests to interconnect indirectly with rural LECs.

B. The Act Does Not Impose Interconnection Requirements on the Rural LECs Until the WCs Request Interconnection to Open the Negotiation and Arbitration Process

Petitioners point to §§251 and 252, as well as §332, as authority for the supposed violations committed by rural LECs. They accuse the LECs of failing to request interconnection and negotiate reciprocal compensation agreements and of "unilateral" filing of tariffed charges for terminating wireless traffic. However, the Petitioners have it

backwards. It is the Petitioners who have the obligation to request negotiation of indirect interconnection.

Section 251(b)(5) requires all "local exchange carriers"⁹ to "establish reciprocal compensation arrangements for the transport and termination of traffic," and §251(a)(1) requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." But neither mandate is self-executing. The obligations for a LEC begin with a request from another carrier. The Conference Report leaves no doubt. It explains that;

the duties imposed under new section 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person who actually seeks to connect with or provide services using the LEC's network.¹⁰

The Commission's rules reflect the same need for a carrier desiring interconnection to trigger a LEC's duties with a request. For example, 47 C.F.R. §51.703 states the LEC's duty to establish reciprocal compensation arrangements is owed to "any requesting telecommunications carrier."

Section 332 has the same prerequisite for carriers seeking to obtain interconnection. That provision grants unique treatment for WCs, but also requires affirmative action by them to activate LECs' obligations towards them. Section 332(c)(1)(B) applies "[u]pon reasonable request of any person providing commercial mobile service." Only then does the mandate arise for the Commission to "order a common carrier to establish physical connections with such service pursuant to the

⁹ LECs are local exchange carriers, but WCs are not unless the Commission changes their status, which the WCs have successfully resisted.

¹⁰ *Joint Explanatory Statement of the Committee of Conference*, H.R. Conf. Rep. No. 104-458, S. Rep. No. 104-230, at 121 (1996) (Conference Report).

provisions of section 201 of this title." Moreover, that requirement applies only to "physical connection," not indirect links via another carrier such as those the WCs are using here. The WCs have deliberately avoided making any of the necessary interconnection requests, let alone the "reasonable requests" that are the missing foundation for their whole line of argument. Although their excuse is that the need for multiple negotiations is too burdensome, the fact is that the WCs' conduct has allowed them to pay nothing for termination. The WCs then offer self-serving claims that their refusal to pay is respectable as a "bill-and-keep" regime. Thus, the WCs' demands for prohibitions on filing and charging under state tariffs rest on non-existent duties and mistaken claims of LEC derelictions are unavailing under the terms of the 1996 Act.

C. State Tariffs for Wireless Terminations Are a Lawful Way to Fill the Gap Left by WCs' Failure to Initiate the Statutory Interconnection Process

The Petitioners have failed to request interconnection with the terminating rural LECs or to identify where their indirectly interconnected traffic originates. They hide behind non-rural LEC transiting carriers. Petitioners, of course, cannot file an agreement pursuant to §252 because the claimed "default" arrangement does not rest on any agreement. As a result, rural LECs are faced with a flow of uncompensated wireless traffic entering their networks as an unidentified part of the traffic delivered by the non-rural LECs. The rural LECs resort to state tariff charges for wireless termination is a lawful response to Petitioners' choice, not an assault on the statute as the WCs suggest.

1. State Tariffs Are a Practical Necessity

The rural LECs have never agreed to adopt a bill-and-keep arrangement for CMRS traffic. It is only the unilateral decision by the BOCs to terminate the existing compensation mechanisms and the failure of WCs to request and negotiate reciprocal compensation agreements that has thrust the unpaid traffic – which the Petitioners creatively label "bill-and-keep" – on the rural LECs.¹¹ The present situation has created an opportunity for the WCs to utilize the rural LECs' networks without fair compensation and a disincentive for any wireless provider to negotiate alternative arrangements.

The WCs state that the number of negotiations that would be required in each indirect interconnection situation is cost prohibitive.¹² This is reflected in their argument that this traffic is *de minimis*, so it would be inefficient to seek out agreements in every case. The WCs argue that "the dollars involved often do not justify the time and expense associated with negotiating an interconnection contract..."¹³

While the traffic may be small for each individual WC, the cumulative amount can be significant to the rural carriers.¹⁴ In some cases, the rural LEC does not have a long-term relationship with a WC, and the use of its network for wireless terminations is sporadic at best. Tariffs are a particularly efficient way to cover the cost of providing network facilities to terminate the casual carrier's traffic. Without tariffs, the rural carrier has no means of being compensated for the cost of its network.

¹¹ See Alliance of Incumbent Rural Independent Telephone Companies at 10-11.

¹² See Petition at 3, AT&T Wireless at 3, Rural Cellular Association at 6.

¹³ Petition at 4; Qwest at 3.

¹⁴ The Rural Carriers agree with NTCA, p. 9, that the growth of wireless traffic is not *de minimis*. In fact, as the Rural Iowa Independent Telephone Association questions, p. 3, if the volume of traffic is *de minimis*, why file this petition at all? The obvious answer is that the traffic involved is not *de minimis* to either the providers or the independent LECs. As evidenced by the considerable time, effort and resources expended by the parties in various regulatory and legal proceedings in the state of Missouri, see MITG at 4-11, the issue of CMRS traffic and the compensation for such traffic is quite significant.

The cost-effectiveness of tariffs warrants their use. The WC non-payment approach fails to compensate rural LECs for the use of their facilities, thereby denying rural LECs reciprocal compensation. As pointed out by MIC at 5-6 and TCA at 2, the Petitioners, themselves have filed comments asserting their own right to file tariffs in order to receive compensation for the use of their networks in *Petitions of Sprint PCS and AT&T Corporation for Declaratory Ruling on Issues Contained in the Access Charge Litigation Sprint PCS v. AT&T*.¹⁵ Simply put, the Petitioners want compensation for the use of their own networks, but want to continue to use the rural LECs' networks for free. Several of the commenting parties explain how the rural LECs were previously compensated for their role in the termination of wireless traffic by the BOCs through tariff and/or contractual arrangements.¹⁶ It is only since the Telecom Act of 1996, and in some cases, the much more recent past, that the BOCs have, one by one, unilaterally, eliminated the billing and collection arrangements that previously compensated the independent LECs for the use of their networks.

2. State Tariffs Do Not Violate Commission Policy or LEC Duties to Negotiate in Good Faith

The task involved in pursuing the negotiation path for every LEC to which direct or indirect connecting traffic flows is a problem for the rural LECs, too. In the absence of requests for interconnection from WCs, §251(d)(3) preserves the effectiveness of state authority that is not inconsistent with the law. Before the process is properly invoked by a request from the carrier seeking interconnection, the law does not indicate how to proceed with indirect termination charges. State tariffs under state authority provide a

¹⁵ 17 FCC Rcd 13192 (2002).

¹⁶ AT&T Wireless at 3, Oklahoma Rural Telephone Companies at 4, Missouri Independent Telephone Group at 4.

lawful way to fill the vacuum left by the WCs choice to avoid multiple negotiations and agreements or arbitration that would inevitably force them to pay reasonable compensation.

State tariffs do not deprive WCs of any legal rights. LECs are well within the law to seek a state-supervised means to provide indirect interconnection. TDS believes it possible, as Fred Williamson and Associates states at 1, for wireless termination tariffs to exist that are “neither unlawful or at odds with the Act or Commission rules.”

Indeed, state tariffs comport with §252(d)(3) because they provide for compensation for termination for rural LECs, whereas the WCs' fictional bill-and-keep default impedes implementation of a reasonable reciprocal compensation basis for interconnection. The state tariff route is anything but "unilateral." State processes provide for participation by interested parties and for scrutiny by state regulators. As pointed out by MIC at 4 and Alliance at 17-19, there are administrative processes for challenging the fairness or lawfulness of individual tariff provisions. Contested tariff cases allow investigation and determination of the legality and reasonableness of tariff provisions by state commissions. In fact, these are the same state commissions that §252 vests with the authority and responsibility to arbitrate provisions of interconnection agreements. Approval of a tariff for termination of traffic involves the same responsibility.

In any event, the inconvenience of the statutory negotiation process does not empower the WCs to self-prescribe bill-and-keep arrangements instead of requesting

interconnection.¹⁷ In contrast to state authority over rural LECs' termination tariffs, even the WCs' basic claim that bill-and-keep applies has not been subjected to state scrutiny. Their arrangement is precisely the kind of unilateral action the Petition erroneously finds in the LECs' public state tariffs.

The Petition's request for a broad prohibition of the tariffs also makes generalized, but unverified, claims about the contents and effects of state tariffs. The Petition argues that the fundamental problem with wireless termination tariffs is that small ILECs unilaterally set unfair and unlawful terms and conditions for interconnection and do not employ TELRIC prices.¹⁸ The idea that the tariffs' terms and conditions are unfair is a subjective argument, and the charge that they are unlawful is yet to be determined. Moreover, the Petitioners' complaints refer to specific terms and conditions of individual tariffs. There is no record to support an assumption that all wireless termination tariffs contain “unfair” and “unlawful” terms and conditions. It should not preempt valid state procedures, especially when the WCs have chosen not to use the statutory negotiation/arbitration framework Congress provided.

Moreover, contrary to the comments of Cingular Wireless at 5, the Petitioners have not brought themselves into a posture where they are entitled to forward looking costs, since they have not made requests, let alone sought state arbitration. Those actions are necessary to trigger application of the pricing standards in §251(d). It is also

¹⁷ There is no intent here to diminish the inconvenience of negotiating with a multitude of carriers that do not directly interconnect with the LECs. However, such “inconvenience” does not justify the relief sought by the Petitioners to cement their end run around the statute.

¹⁸ Petition at 5.

important to note that voluntarily negotiated agreements need not comply with the §251 requirements.¹⁹

The Petition tries to use pre-1996 Act statements by the Commission condemning past situations where carriers filed tariffs to trump ongoing or upcoming negotiations with requesting carriers. The past statements are inapposite. Congress adopted the new statutory framework to remedy such problems from the pre-Act years. The statute is now the measure of carrier and state actions. In any event, there is no effort to trump negotiations when LECs file state tariffs to fill the void left when the WCs have deliberately shunned the negotiation process by declining even to notify the LECs of their desire to establish interconnection under the law.

Nor have the Petitioners supported their accusations that the LECs have violated their duty to negotiate in good faith by filing state tariffs. Petitioners' claims are without merit because they claim violations of obligations that would not attach for most rural LECs even if the WCs had made the legally essential requests for interconnection with the rural LECs. The law imposes stricter requirements on incumbent LECs in §251(c), which amplifies their interconnection requirements, adding a duty to negotiate pursuant to §252 for both the incumbent LEC and the "requesting telecommunications carrier." Most rural LECs remain exempt from these requirements under §251(f). The exemption can be terminated with specified state rulings, but even the termination process must begin with a request to the LEC from the other carrier. In any event, the rural LECs remain prepared to negotiate in good faith upon reasonable request to interconnect. If the Petitioners want to initiate negotiations, they need only request interconnection under the statutory framework Congress enacted.

¹⁹ 47 U.S.C. §252(a)(1).

Efforts to negotiate have revealed significant problems. Much emphasis, in both the petition and the comments, has been placed on the incentive to negotiate. The Petitioners argue that by filing “unilateral” wireless termination tariffs, the independent LECs avoid their duty to negotiate interconnection agreements. Contrary to CTIA’s claim at 5, Rural Carriers have attempted to negotiate agreements with many of the WCs. It is the Rural Carriers' experience, while some WCs are willing to negotiate and enter into agreements for reciprocal compensation; others frustrate the negotiation process through systematic delays or non-response. These same carriers, if they can be persuaded to negotiate at all, refuse to acknowledge their obligation to pay compensation for the traffic that has been exchanged during the self-imposed delay. The Commission should disregard the Petitioners arguments that rural LECs have violated their duty to negotiate in good faith.

D. Bill-and-Keep is Not the Default Arrangement or Even a Lawful Arrangement When the Traffic Is Not Balanced

The Commission outlined the current interconnection obligations of various types of carriers in opening this proceeding. It observed that WCs pay access charges for calls not terminated in their MTAs; that reciprocal compensation based on forward-looking costs applies for calls within their MTAs. It also stated that its rules "permit a state public utility commission ... to impose a bill-and-keep arrangement." However, the Commission continued, bill-and-keep is acceptable only "provided that the traffic exchanged between the interconnecting carriers is relatively balanced and neither party

has rebutted the presumption of symmetric rates."²⁰ Far from endorsing or even recognizing bill-and-keep as a *de facto* default mechanism, the Commission found that:

Existing access charge rules and the majority of existing reciprocal compensation agreements require the calling party's carrier, whether LEC, IXC or CMRS, to compensate the called party's carrier for terminating the call. ... Such CPNP arrangements, where the calling party's network pays to terminate a call, are clearly the dominant form of interconnection regulation in the United States and abroad.²¹

Thus, there is simply no basis for the WCs' contention that bill-and-keep is the proper default arrangement where an agreement has not been negotiated or adopted by a state after arbitration.

In the intercarrier compensation proceeding, the Commission is still in the midst of considering an enormous record compiled to help it determine whether to adopt bill-and-keep or other intercarrier arrangements. It would be peculiar to sanction bill-and-keep as a lawful default, before it completes the rigorous evaluation that the proceeding involves. In contrast, using state tariffs to recover the costs of termination during the proceeding is a workable mechanism that comports with the Act's fundamental purpose of requiring interconnection and ensuring that all carriers are fairly compensated.

The reciprocal compensation provisions and Commission policies also prevent a presumption that bill-and-keep is a satisfactory default here. As noted above and in the comments, bill-and-keep is not even a permissible option for a state-arbitrated interconnection arrangement unless the "traffic exchanged between the interconnecting

²⁰ *Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, CC Docket Nos. 01-92, 99-68, 96-98, FCC 01-132, ¶¶ 7-9 (rel. April 27, 2001) (footnote omitted) (Intercarrier Compensation NPRM).

²¹ *Id.* at ¶ 9.

carriers is relatively balanced and neither party has rebutted the presumption of symmetric rates."²² The traffic here does not even meet the first part of that prerequisite. The comments make it clear that the wireless traffic flowing to the LECs often far exceeds LEC traffic terminating on wireless networks.²³ The self-serving bill-and-keep regime the WCs claim as their right as a default mechanism lacks any of the legitimacy the WCs assert. Given the traffic imbalance and the present lack of compensation arrangements the loss to rural LECs is growing and substantial. The present situation amounts to an unlawful and unauthorized implicit subsidy that WCs have awarded themselves, which places a burden on all local exchange customers in rate-of-return companies, such as the TDS LECs.

E. Conclusion

Over time, as traffic from and the numbers of CMRS carriers increases, as it will with the evolution of new technology, rural LECs are very concerned with the public interest of recovering their cost and not at the expense of their core wireline customers. High cost rural companies cannot handle the loss of even "*de minimis*" amounts of revenue over the long term.

The Commission should act now to address the concerns raised by the parties in this proceeding. Refraining from addressing the Petition at this time, as advocated by USTA, at p. 2, only serves to perpetuate the existing inequitable situation. Procedures for cost recovery need to be established now which will not set a precedent for free use of the network in the future. Tariffs provide a lawful and workable method to do that. The Commission should act expeditiously to:

²² See ICORE at 5-6

²³ See ORTC at 9 (citing sample study in Oklahoma).

- 1) Affirm that state tariffs are a lawful vehicle to establish cost recovery in the absence of a request by a wireless carrier to connect indirectly with a rural LEC.
- 2) Reaffirm that LECs have a duty to negotiate 251 (b)(5) reciprocal compensation arrangements upon request.

Respectfully submitted,

/s/

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